IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.999/2003

Amar Chand S/o Prakash Chand
...Accused-appellant
Versus
The State of Rajasthan
...Respondent

Date of Judgment :::: 2nd May, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri A.K. Gupta, with Shri Rinesh Gupta and
Shri J.R. Bijrania and
Shri Virendra Singh Gujar, Counsel accused-appellant
Shri Arun Sharma, P.P., for the State
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//Reportable//

By the Court:-

Accused-appellant Amar Chand S/o Prakash Chand has challenged the impugned judgment and order dated 2nd July, 2003, passed by the Additional District & Sessions Judge (Fast Track) Ajmer, in Sessions Case No.96/02 (19/01) whereby he was convicted and sentenced under Section 376, IPC, to undergo 7 years rigorous imprisonment and a fine of Rs.10,000/- (Rupees ten thousand); in default of payment of fine, to further undergo additional six months simple imprisonment.

Briefly stated the facts of the case are that on 23rd October, 2000, PW-1 Kumari Sunita (the prosecutrix) submitted a typed-report (Exhibit P-1) before the Superintendent of Police, Ajmer, wherein it was mentioned that on 20th February i.e. about 7-8 months ago, Amar Chand called her to cook food at his house, where he committed forcible sexual intercourse with her and she conceived. When accused-persons came to know about her pregnancy then they tried for her miscarriage. The accused and his family members offered her Rs.15,000/- for not making any complaint. They also gave threatening to her and her mother of dire consequences. Accused also got false letters written from her that she wants to commit suicide at her own will. She is about 15 years of age. The other detailed facts were also mentioned in the report.

On the basis of the aforesaid report, First Information Report No.120/2000 was registered at Mahila Police Station, Ajmer, on 24.10.2000 under Section 376/120-B, IPC, against appellant Amar Chand and other persons, namely, Kailash Chand, Prakash Chand, Smt. Maya, Smt. Manju and Smt. Sunita. The prosecutrix was medically examined on 24.10.2000. Her medical report is Exhibit P-4. An advance pregnancy of about 36 weeks was mentioned.

She was admitted in Hospital on 10.11.2000 where she delivered a female child. She was discharged from Hospital on 17.11.2000. Her discharged-ticket is Exhibit P-10. The investigation was made in the case. The accused-persons were arrested. The site-plan was prepared. After completion of investigation, a challan was filed against the accused-persons.

The trial court, after hearing the arguments, vide its order dated 27.8.2001, framed charge against appellant and co-accused Kailash for the offence under Section 376 (2)(g) of the I.P.C., and discharged other accused-persons, namely, Prakash Chand, Smt. Manju, Smt. Maya and Smt. Sunita, from the offence under section 376 and 376/120-B, IPC. The appellant and co-accused Kailash denied the charge and claimed trial.

The learned trial court, after hearing both the parties and considering the evidence on the record, vide its impugned order, acquitted the co-accused Kailash from the charge framed against him but convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel Shri A.K. Gupta appearing on behalf of the accused-appellant contended that the trial court has already recorded a finding that it was a consented sexual intercourse and the appellant has been

convicted in view of finding of trial court that the prosecutrix was 14-½-years of age at the time of incident, therefore, he is challenging the finding of trial court only in respect of age of the prosecutrix. He contended that according to the medical-report (Exhibit P-9), the age of prosecutrix was above 16 and below 19 years of age, which was proved by PW-4 Dr. Manohar Vadhwani and PW-5 Dr. Rina Mathur, but the trial court, instead of recording its finding on the basis of medical-report (Exhibit P-9), wrongly relied upon other prosecution evidence i.e. Exhibit P-5A Birth Certificate issued by the Nagar Parishad, Exhibit P-6A school transfer-certificate, Exhibit P-7A another school transfer-certificate, Exhibit P-8A T.C. Form and Exhibit P-25 the mark-sheet of secondary class of Sunita issued by the Board of Secondary Education for Rajasthan, Ajmer. He contended that this documentary evidence was not admissible in evidence as the same was not proved according to law. Exhibit P-25 was only a Photostat copy and could not have been read being secondary evidence in view of Section 65 of the Evidence Act. An objection was raised in respect of Exhibit P-5A, Exhibit P-6A, Exhibit P-7A, Exhibit P8A, when they were produced in the court on 25.9.2002 by PW-3 Shiv Dayal, the father of the

prosecutrix, as they were not part of charge-sheet and the trial court wrongly rejected their objection and wrongly admitted these documents in evidence and exhibited them, therefore, he contended that in case these certificates are not taken into consideration then there is no evidence in respect of age of the prosecutrix that her date of birth was 1.11.1985 and she was 14-½ years of age on the date of the incident, and the only evidence remains for consideration is the medical-report (Exhibit P-9) wherein her age has been described as above 16 years and below 19 years. However, he does not dispute that Exhibit P-25 - mark-sheet issued by Board of Secondary Education, was part of charge-sheet and no such objection was taken when it was admitted and exhibited in the case. He also referred the following cases:-

1. Birad Mal Singhvi V. Anand Purohit - AIR 1988 SC 1796

2. Deelip Singh @ Dilip Kumar v. State of Bihar - (2005) 1 SCC 88.

3. Dilip & Another v. State of M.P. - JT 2001 (8) SC 390.

4. Lalta Prasad v. State of Madhya Pradesh - AIR 1979 SC 1276.

In Birad Mal Singhvi v. Anand Purohit (AIR 1988 SC

1796) the Hon'ble Apex Court, while dealing with a case under the provisions of Representation of the People Act (43 of 1951), observed that the entry contained in the admission-form or in the scholar- register must be shown to have been made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by the parents, the entry would have evidentiary value but if it is given by a stranger or by someone else, who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

In Deelip Singh @ Dilip Kumar Vs. State of Bihar - (2005) 1 SCC 88, the Hon'ble Apex Court observed that - no explanation is forthcoming as to why the investigation officer did not obtain the certificate in the course of investigation and why the certificate was not produced by the father of the girl - apparently the age was given on the basis of the declaration made by the father - if so, the father was the best witness to speak about her age. Their Lordships held that the certificate has no evidentiary value inasmuch as it is not properly proved by a witness who is competent to speak of the relevant

facts connected with the issuance and custody of the certificate.

In Dilip & Another v. State of M.P. [JT 2001 (8) SC 390] the Hon'ble Apex Court in the facts and circumstances of that case, observed that the age of the prosecutrix was around 16 years, may be a little more. The fact remains that she was not just a child who would have surrendered herself to a forced sexual assault without offering any resistance whatsoever.

In Lalta Prasad v. State of M.P. (AIR 1979 SC 1276), the Hon'ble Apex Court considered the reliability of the school-certificates produced, and observed that the application-form was not produced nor was it proved therefore the evidence of witness does not help the prosecution case and cannot be said to have proved the age of the girl as being below 16 years of age.

This Court in Bajrang Lal v. State of Rajasthan - [RLR 2006 (2) 146] considered various judgments of the Hon'ble Apex Court in Para Nos.7 to 17 and held that in respect of determination of date of birth of a child it is clear that no strait-jacket-formula can be laid down for it, but it depends on facts and circumstances of each case. The Court is required to scrutinize the whole of its evidence, oral or documentary, available on the

record of a particular case, and sometimes the age based on ossification test is believed and sometimes the age of ward entered in the school record is also believed. Para No.17 and 18 of the judgment read as under:-

> **17. In Vishnu @ Undrya Vs. State of Maharashtra, 2006 (1) RLW 662, the Hon'ble Supreme Court considered its earlier decision relating to similar question in the case of Madan Gopal Kakkad Vs. Naval Dubey and Another (1992 (3) SCC 204, wherein it was pointed out that a medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court. Their Lordships of the Hon'ble Supreme Court in Vishnu @ Undrya's case (supra) observed that in case of determination of date of birth of the child, the best evidence is of the father and the mother. The Hon'ble Apex Court further observed that normally the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In that case their Lordships of the Hon'ble Supreme Court were considering the case where there were different types of evidence in respect of age of the victim and in the facts and**

circumstances of that case did not rely upon the age based on ossification test and the school certificates but gave due weightage to the statements of parents, which were corroborated by the date of birth register of the Greater Bombay Municipal Corporation and the register of the Nursing Home where the victim was born. Their Lordships of the Hon'ble Supreme Court observed as under:-

> **"(25)....In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to above, in all material particulars. There are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the**

> **present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age of secure admission in the school. Apart from this, as noticed earlier, the school certificate collected by PW-15 S.I. Bagal was not an authenticated document. No body was produced to prove the date of birth recorded in the school certificate. The date of birth recorded in the school certificate as 29.6.1963 is, therefore, belied by the unimpeachable evidence of PW-1 and PW-13 and contemporaneous documents like date of birth register of Greater Bombay Municipal Corporation and the register of the Nursing Home where the prosecutrix was born and proved by Dr. Shashikant Awasare, as noted above."**
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> **18. In view of the above proposition of law in respect of determination of date of birth of the child it is clear that no strait-jacket formula can be laid down for it, but it depends on facts and circumstances of each case. The court is required to scrutinize the the whole of its evidence, oral or documentary, available on the record of a particular case. Sometimes the age based on ossification test is believed and sometimes the age of ward entered in the school record is also believed."**

The learned Public Prosecutor defended the finding of the trial court in respect of age of the prosecutrix and contended that there is sufficient prosecution evidence available on the record to support the finding of the trial court which is based on oral and documentary

evidence and there is no illegality in it and the appeal is liable to be dismissed being devoid of merit.

I have considered the submissions of learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of the trial court.

The sole question involved for determination in this appeal is whether the date of birth of the prosecutrix was 1.11.1985 and she was 14-½ years of age on the date of incident or she was above 16 years of age.

The trial court, after appreciating the evidence on the record, has recorded a finding that it was a case of consented sexual intercourse but in view of its finding about the age of the prosecutrix that she was below 16 years of age, the accused-appellant was convicted. The oral prosecution evidence in respect of age of the prosecutrix is statement of PW-1 Sunita (Prosecutrix), PW-2 Smt. Prabhati (Mother), PW-3 Shiv Dayal (Father); the documentary evidence is Exhibit P-5A the birth-certificate of Sunita issued by Nagar Parishad, Ajmer, Exhibit P-6A the Transfer-Certificate issued by New Modern Central School, Ajmer, Exhibit P-7A the Transfer-Certificate issued by the Government Primary School, Gothda Bhukhran, Exhibit P-8A the Transfer-

Certificate-Form issued by Kusumla Girls Secondary School, Adar, Ajmer, Exhibit P-9 the medical-report, Exhibit P-25 the mark-sheet of secondary class of Kumari Sunita issued by the Board of Secondary Education, Rajasthan.

PW-1 Sunita, in her statement, has stated that her date of birth is 1.11.1985. PW-2 Smt. Prabhati has stated that her daughter had not completed 15 years of age on the date of occurrence. PW-3 Shiv Dayal during his examination-in-chief, filed Exhibit P-5A to Exhibit P-8A and contended that in all these certificates, the date of birth of her daughter is mentioned as 1.11.1985. In Exhibit P-9 the age of prosecutrix Sunita has been mentioned as above 16 years and below 19 years. In Exhibit P-25 the date of birth of Sunita has been mentioned as 1.11.1985. There is no dispute that in Exhibit P-5A to Exhibit P-8A and Exhibit P-25 the date of birth of the prosecutrix has been mentioned as 1.11.1985. The question is only whether these documents were rightly admitted in evidence and exhibited in the case and the trial court was justified in recording his finding on the basis of its documentary evidence.

Exhibit P-5, the birth-certificate of Sunita was issued by the Nagar Parishad, Ajmer, but date of

registration of date of birth i.e. 1.11.1985 in this certificate has been mentioned as 1.2.2001. The certificate was issued on 2.2.2001. The date of incident has been given as 20.2.2000. The written-report was lodged on 24.10.2000, therefore, it appears that the entry regarding date of birth in the register of the Nagar Parishad, Ajmer was made on 1.2.2001 i.e. after the date of incident as well as date of FIR and it appears that the said date has been entered after about 15 years from the date of birth, and particularly after lodging the FIR, therefore, in my view, the same cannot be relied upon and could not have been made basis for recording the finding by the trial court.

The Transfer Certificate - Exhibit P-6A was issued on 18.12.2000 wherein Sunita was admitted in Class II on 12.7.1991 vide Admission No.45; she left from Class IV on 17.7.1993. The learned counsel for the appellant contended that PW-1 in her statement admitted that she read Class I to Class IV in New Modern Central School, Ajmer, whereas this certificate shows that she took admission in Class II and not in Class I and this certificate being contrary to statement of PW-1 cannot be relied upon to determine the date of birth of the prosecutrix. The learned counsel for the appellant is

right in saying that as per the certificate (Exhibit P-6), she was admitted in New Modern Central School, Ajmer in Class II, whereas PW-1 stated that she started her studies in the said school from Class I. The Principal of the said school has not been examined and the original register, on the basis of which the transfer certificate Exhibit P-6A has been issued, was not produced, therefore, this could not have been made basis for determining the age of the prosecutrix. Similar is the position in respect of Exhibit P-7 and Exhibit P-8 as the original school register and original admission form have not been produced. The concerned Headmaster has also not come in witness-box to prove the contents of Exhibit P-7 and Exhibit P-8.

These certificates were not produced by PW-3 during investigation of the case before the Investigating Officer, and an objection was raised in this behalf by learned counsel for accused during examination-in-chief of Shiv Dayal (PW-3), who produced Exhibit P-5A to Exhibit P-8A on the record, and, in his cross-examination, admitted it to be correct that entries in these certificates were not made in his presence. He also admitted that the basis on which these certificates have been issued, cannot be produced by him. In these

circumstances, I am of the view that Exhibit P-5A to Exhibit P-8A could not have been made basis by the trial court for determining the age of the prosecutrix.

So far as Exhibit P-25 - the mark-sheet of secondary class of Sunita is concerned, I find that it has been issued on 25.7.1999 by the Board of Secondary Education, Rajasthan, i.e. much before the date of the incident and the date of lodging the FIR. It was produced during investigation of the case itself and it was a part of the charge-sheet also. Exhibit P-25 has been proved by PW-15 Bannalal, the Investigating Officer. It is relevant to mention that no objection was raised on behalf of the accused when Exhibit P-25 was exhibited by the trial court. A copy of the document Exhibit P-25 was a part of charge-sheet and was very much available with the appellant also. This document Exhibit P-25 shows the date of birth of Sunita as 1.11.1985 and her age on the date of incident comes to 14 years and 3 months.

PW-1 Sunita herself stated in her examination-in-chief itself that her date of birth is 1.11.1985. PW-2 Smt. Prabhati has also stated that her daughter Sunita had not attained the age of 15 years at the relevant time. PW-3 stated date of birth of Sunita as 1.11.1985. Their Lordships of the Hon'ble Supreme Court in Vishnu @

Undrya's case (Supra) observed that in case of determination of date of birth of the child, the best evidence is of the father and mother. The Apex Court in the facts and circumstances of that case did not rely upon the age based on ossification test. In Madan Gopal Kakkad's case (Supra), the Apex Court pointed out that a medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character. Exhibit P-9, the medical-certificate, mentions the age of victim above 16 years and below 19 years and it can vary on either side to three years. If 16 years age varies to 13 to 16 years then it is corroborated with the statements of PW-1, PW-2 and PW-3 as well as Exhibit P-25, therefore, in my view, the learned trial court was right in recording a finding about age of the prosecutrix as 14-½ years on the date of the incident and I do not find any illegality or perversity in the finding of the learned trial court, so far as conclusion regarding the age of the prosecutrix is concerned. However, my conclusion in this regard is also same but based on testimony of PW-1, PW-2, PW-3 and Exhibit P-25, as discussed above.

It is clearly made out from the oral and

documentary evidence, as discussed above, that the prosecutrix was below 16 years of age and even if the trial court has recorded a finding that the prosecutrix was a consenting party to the sexual intercourse then the same was immaterial and the accused has rightly been convicted by the trial court under Section 376, IPC.

The learned counsel for the appellant has not challenged the other findings of the trial court including the finding that accused committed sexual intercourse with prosecutrix, except the finding relating to the age of the prosecutrix, therefore, it is not necessary to discuss the evidence in respect of other issues.

Now coming to the question of sentence of imprisonment of the accused-appellant, it is relevant to mention that under sub-section (1) of Section 376 IPC the minimum sentence of seven years is prescribed but it is subject to proviso that the court may, for adequate and special reasons, impose a sentence of imprisonment for a term of less than seven years. It is apparent from the record that according to the finding of the trial court itself the prosecutrix was consenting party to sexual intercourse with the accused and further that her statement in part with regard to accused Kailash Chand

has been disbelieved by the trial court, I think it fit and proper to reduce the sentence of imprisonment of the accused awarded by the trial court.

In Prem Chand Vs. State of Haryana, (AIR 1989 SC 937), in the peculiar facts and circumstances of that case, the Hon'ble Supreme Court reduced the sentence of imprisonment of ten years awarded under Section 376 (2) IPC, to a period of sentence of imprisonment of five years. The State of Haryana filed review petition before Hon'ble the Supreme Court in the above case and the same was dismissed. The decision of the Hon'ble Supreme Court in that review petition is reported in (1990) 1 SCC 249 (State of Haryana v. Prem Chand & Others).

In Ram Kumar Vs. State of Haryana (2006) 4 SCC 347, their Lordships of the Hon'ble Apex Court reduced the sentence of seven years under Section 376, IPC, to a period of three years imprisonment. Para No.3 of the judgment reads as under:-

> **"3. The appellant, aggrieved by the order passed by the High Court has filed the above appeal by way of appeal. We have been taken through the statement and evidence recorded by the Court. Our attention was also drawn to the judgment passed by both the**

Sessions Court as well as the judgment passed by the High Court. The learned counsel for the appellant drew our attention to the statement of the girl Bimla (PW-5) and also drew our attention to the evidence of the doctor. We have carefully analysed the evidence tendered by the prosecution. In our opinion, sufficient evidence was tendered by the prosecution to prove the guilt of the accused. However, at the time of hearing it is brought to our notice that the girl has now got married and living with her husband. The said statement is also ratified by the evidence of the father of the girl. Having regard to the peculiar facts and circumstances of the case, we are of the view that the sentence imposed by the Sessions Court and as affirmed by the High Court under Sections 366 and 376 of the Penal Code is on the highside. In our opinion, ends of justice would be amply met if we reduce the sentence to three years. We do so accordingly."

In the case of State of Chhattisgarh Vs. Lekhram (2006) 5 SCC 736, the Hon'ble Apex Court reduced the minimum sentence under Section 376, IPC, of seven years to a sentence of one-and-half-year imprisonment, already undergone by accused therein. Para 16 of the judgment reads as under:-

"16. The prosecutrix was a

mature girl. She was married. She spent a few months in her in-laws' place. The respondent was working in her house. They, thus, knew each other for a long time. The prosecution evidently could not prove its case that she was enticed away from the custody of her guardian by the respondent on a false plea that he would marry her. She denied the said suggestion as presumably she was aware that she being married, the question of her marrying the respondent again may not arise. She lived for some time with the respondent in a rented house. Both the courts proceeded on the basis that she was a consenting party. The occurrence took place in the year 1986. The respondent preferred an appeal before the High Court in the year 1987. The same remained pending for about 10 years. The special leave petition was filed by the State 230 days after the prescribed period of limitation for preferring such appeal. The delay in filing the special leave petition, however, was condoned. He is said to have remained in custody for about one-and-a-half years. In the peculiar facts and circumstances of this case and having regard to the facts that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to send the appellant back to prison."

In the facts and circumstances of the present

case, as discussed above, I am of the view that ends of justice will meet if the sentence of imprisonment awarded by the trial court is reduced to a period of 5 years R.I.

Consequently, the appeal is partly allowed. The conviction of the appellant under Section 376, IPC, is maintained, but his sentence of imprisonment awarded by trial court is reduced to a period of five years rigorous imprisonment.

(Narendra Kumar Jain) J.

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